

NEW JERSEY
INDIVIDUAL HEALTH COVERAGE PROGRAM

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OAL Dkt No. IHC
08083-02S
Agency Dkt No.
A.O.04-

IN THE MATTER OF THE NEW
JERSEY INDIVIDUAL HEALTH
COVERAGE PROGRAM BOARD'S
ADJUSTMENT OF BLUE CROSS
AND BLUE SHIELD OF NEW
JERSEY'S REQUEST FOR
REIMBURSEMENT OF LOSSES
FOR CALENDAR YEARS 1993
AND 1994

Final Decision

We have reviewed the Initial Decision of Administrative Law Judge ("ALJ") Douglas H. Hurd dated August 6, 2004, and mailed to the parties on August 12, 2004, as well as the written exceptions and the reply thereto filed on behalf of petitioner and respondent respectively. Upon review of the entire record, we conclude that the ALJ's Initial Decision should be adopted in its entirety.

This matter arises out of an appeal by

Petitioner, Blue Cross Blue Shield of New Jersey, Inc., f/k/a/ Blue Cross and Blue Shield of New Jersey (hereinafter "Horizon") to the Superior Court of New Jersey, Appellate Division, from New Jersey Individual Health Coverage Program Board (hereinafter "IHC Board") Orders No. 96-21, 96-23 and 99-02. These decisions independent audit of Horizon's reported losses on individual health insurance for 1993 and 1994 was valid and within the bounds of generally accepted auditing standards; and

1) confirmed the c

2) denied Horizon's request for an OAL hearing on the issue of whether Horizon waived its right to reimbursement for certain expenses and found as a matter of law that Horizon had waived that right because it had made unambiguous statements in certifications filed with the Board stating that it was not seeking reimbursement of those expenses for 1993 and 1994.

On April 16, 2002, the Appellate Division affirmed the Board's decision on the independent audit methodology and reversed the Board's decision to deny Horizon a hearing on the issue of waiver. It remanded the matter, however, for fact-finding to determine whether Horizon's conduct satisfied the elements of waiver, specifically the element of intent. In re Individual Health Coverage Program Board's Adjustment of Blue Cross and Blue Shield of N.J.'s Requests for Reimbursement of Losses for Calendar Years 1993 and 1994 ("In re Horizon"), No. A-4020-98T1 (App. Div. Apr. 16, 2002)(per curiam).

Accordingly, the IHC Board transmitted the following issue to the Office of Administrative Law ("OAL"):

Did Horizon, by virtue of providing certifications in 1993 and 1994 to the IHC Board which stated that it was not seeking reimbursement of employee incentive expenses and amortization of deferred system development costs (hereinafter, the "MICP expenses and CARS costs"), intend to waive its right to reimbursement of those expenses and costs?

The OAL received the IHC Board transmittal on November 6, 2002. Hearings were held on October 20, 2003 and January 7, 2004. The record closed on July 6, 2004 with the filing of post-hearing briefs.

In the Initial Decision, ALJ Hurd accepted and adopted paragraphs 1-35 of a Joint Stipulation of Facts that the parties had submitted, and supplemented the Joint Stipulation with six additional findings of fact. Initial Decision at 2-3. ALJ Hurd thoroughly considered all of the facts and evidence in the record and decided that the IHC Board satisfied its burden of proving that Horizon did waive its right to seek reimbursement for the MICP and CARS expenses in connection with its 1993 and 1994 Exhibit K filings. Initial Decision at 6.

The ALJ found that evidence of other carriers'

ability to amend their Exhibit K filings, as well as specific evidence regarding another carrier's amendment to an Exhibit K, discussed and approved by the IHC Board in May 1999, was irrelevant to this case. Initial Decision at 3. The ALJ also ordered that testimony regarding excluded exhibits P-16 and P-17, as well as excerpts quoted from those exhibits that appeared in Horizon's post hearing briefs, be held under seal because they contained privileged material. Initial Decision at 6.

Finally, ALJ Hurd declined to address the issue of whether the IHC Board violated the enabling statute, N.J.S.A. 17B:27A-12, by disallowing items expressly found reimbursable under the statute by the independent auditors, since this issue was beyond the scope of the issue remanded by the Appellate Division. Ibid.

Horizon submitted exceptions to the Initial Decision on August 25, 2004, and IHC Board submitted a brief in reply on September 10, 2004, pursuant to an extension granted on September 13, 2004.

In Exceptions, Horizon asserted that

- 1) The ALJ erred in determining that the language contained in certifications and affidavits submitted by Horizon demonstrated that it intentionally and

voluntarily "waived" its right to seek subsequent reimbursement for certain administrative expenses initially excluded from its 1993 and 1994 net-paid loss reports ("Exhibit Ks").

2) The ALJ erred in concluding that Horizon knew that the expenses it excluded from the Exhibit Ks were statutorily reimbursable.

3) The ALJ erred in determining that Horizon's exclusion of certain administrative expenses from its Exhibit Ks was predicated on a "mistake of judgment" as opposed to a "mistake of fact."

4) The ALJ erred in concluding that the IHC Board provided valuable consideration to Horizon in return for the alleged "waiver."

5) The ALJ erred in determining that William Frantel's testimony during the January 2004 hearing partially contradicted his 1996 affidavit.

[6] The ALJ erred in concluding that other carriers' ability to amend their Exhibit Ks was irrelevant for purposes of determining whether Horizon had "waived" its right to seek reimbursement for expenses that it excluded from its own Exhibit Ks. Moreover, the ALJ ignored the salient fact that the IHC Board previously had allowed Horizon to amend its Exhibit K in a situation that was beneficial to the Board.

[7] The ALJ erred in finding that the IHC Board's decision to allow Travelers to amend its Exhibit K in 1999 - in a situation similar to Horizon's - also was irrelevant. The ALJ also erred in excluding Exhibits P-16 and P-17 (which pertain to the IHC Boards' decision regarding Travelers) from evidence.

[8] The ALJ erred in failing to consider Horizon's argument that the IHC Board

violated its own enabling statute.

[9] The ALJ failed to address the arguments regarding privilege and, therefore, erred in concluding that testimony regarding Exhibits P-16 and P-17, as well as the exhibits themselves, should be held under seal because they contain privileged information. [Exceptions of Petitioner at 1-2].

Horizon also asserted that the ALJ should have made an additional 38 findings of fact and five additional conclusions of law.

In its reply brief, the IHC Board asserted that the ALJ correctly concluded that the IHC Board met its burden of proving that Horizon's actions met the elements of waiver regarding Horizon's decision to exclude the MICP and CARS costs from its net paid losses for 1993 and 1994; that other carrier's amendments of their Exhibit Ks were not relevant to Horizon's waiver; that portions of Exhibits P-16 and P-17 were privileged, and that the exhibits as well as excerpts therefrom should be held under seal; and that allegations that the IHC Board violated its regulations in 1996 were not relevant to the issue before the OAL.

We concur with the ALJ's well-founded findings of fact and conclusions of law that Horizon did waive its right to seek reimbursement for the MICP and CARS expenses in

connection with its 1993 and 1994 Exhibit K filings; that Exhibits P-16 and P-17 contained privileged material and therefore, the exhibits as well as excerpts therefrom should be held under seal; and that the issue of whether the IHC Board violated the enabling statute, N.J.S.A. 17:27A-12, by disallowing items expressly found reimbursable under the statute by the independent auditors was beyond the scope of the issue before the OAL.

ALJ Hurd correctly found that the evidence showed that Horizon waived its right to reimbursement for MICP expenses and CARS costs which it excluded from its Exhibit Ks in 1993 and 1994.

As noted by ALJ Hurd, waiver is the intentional relinquishment of a known right. Belfer v. Merling, 322 N.J. Super. 124, 139 (App. Div. 1999). As the Court noted in Belfer:

[Waiver] implies an election by a party to forego some advantage, which he might otherwise have demanded. It 'presupposes full knowledge of the right and an intentional surrender,' and it 'cannot be predicated on consent given under a mistake of fact.' However, an intention to waive need not be manifested expressly but may be spelled out from a state of facts exhibiting full knowledge of the circumstances producing a right and continuing indifference to exercise of

that right. [Id. at 139, citations omitted].

Thus, it must be shown that a party charged with waiver knew of his or her legal rights and deliberately intended to relinquish them. Petrillo v. Bachenberg, 263 N.J. Super. 472, 480 (App. Div. 1993). Moreover, waiver must be supported by either valuable consideration or a clear, unequivocal and decisive act showing such a purpose as to amount to an estoppel. Merchants Indemnity Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd 37 N.J. 114 (1962).

The ALJ properly analyzed the credible evidence in the record and concluded that the evidence shows that Horizon intentionally and deliberately chose to exclude approximately \$6 million in MICP expenses and CARS costs from its net paid loss amounts for 1993 and 1994. This conclusion is supported by the clear language of the certifications accompanying Horizon's 1993 and 1994 Exhibit Ks and the later certifications of William Frantel, Michael L. B. Kaplan, and Robert Pures. Exhibits R-1, R-2, R-5, R-6, R-7. As noted by the ALJ, Horizon's certifications accompanying the 1993 and 1994 Exhibit Ks contain no language qualifying or conditioning its decision to exclude the MICP expenses and CARS costs from

the net paid loss amount set forth in the Exhibit Ks. Initial Decision at 5. The intent to waive a right need not be expressly stated, but may be evidenced by a state of facts exhibiting full knowledge of the circumstances surrounding that right. Merchants Indemnity Corp. of N.Y. v. Eggleston, supra, 68 N.J. Super. at 254.

The weight of the credible evidence in the case also shows that Horizon knew that its 1993 and 1994 MICP expenses and CARS costs were reimbursable. As ALJ Hurd noted, testimony adduced on behalf of Horizon indicated that Horizon knew its 1993 and 1994 MICP expenses and CARS costs were reimbursable but chose to exclude those expenses from its 1993 and 1994 Exhibit Ks because it "desired the continued success of the IHC Board Program" and to avoid "sticker shock" on the part of the Board. Initial Decision at 5. The ALJ found Mr. Frantel to be a credible witness. Initial Decision at 3. The evidence, therefore, shows that Horizon knew the 1993 and 1994 MICP expenses and CARS costs were reimbursable, but anticipated a benefit by excluding its MICP expenses and CARS costs from its net paid losses, to wit, the continuation of a program that provided it with reimbursement of its considerable losses. This anticipated benefit created the

valuable consideration necessary to effectuate Horizon's waiver of its right to claim its MICP expenses and CARS costs as part of its net paid losses under the law.

As ALJ Hurd determined, the evidence shows that Horizon's exclusion of its MICP expenses and CARS costs from its 1993 and 1994 net paid losses was not made under a mistake of fact. ALJ Hurd noted that the evidence shows that Horizon was aware that all reimbursement requests were subject to an independent audit and that the audit could result in an adjustment of the net paid loss amount set forth on its Exhibit K. Initial Decision at 5. ALJ Hurd properly rejected Horizon's contention that it made a mistake of fact in "assuming that its loss figures would not be subjected to the unorthodox and incorrect assumptions used" by the auditor. Ibid. ALJ Hurd noted that the evidence shows that Horizon was well aware that the audit would be independent. Initial Decision at 3, 5. As the ALJ noted, Horizon "had no basis to assume that the auditor would use a methodology that it used in the past[.]" Id. at 5. The affidavits of William Frantel, Michael Kaplan and Robert Pures clearly show that Horizon made a business decision to exclude the MICP Expenses and CARS costs from its Exhibit Ks based on its assumption that the

auditor would use an accounting system used by Horizon in the past. Id. at 3. In spite of Horizon's best efforts to the contrary, this cannot be characterized as anything other but a mistake in judgment, not a factual mistake.

Horizon argues in Exceptions that the ALJ wrongly concluded that other carriers' ability to amend their Exhibit Ks was irrelevant for purposes of determining whether Horizon waived its right to seek reimbursement for expenses it excluded from its own Exhibit Ks, and contends that the "continuing disparity in the treatment received by carriers seeking to amend their Exhibit Ks" somehow disproves that it intended to waive its right to reimbursement for the 1993 and 1994 MICP expenses and CARS costs. Horizon's Exceptions at 22.

In the Initial Decision, ALJ Hurd specifically found that "other carriers' ability to amend Exhibit Ks [is] not relevant to this proceeding." Initial Decision at 3. In doing so, ALJ Hurd considered testimony adduced on behalf of Horizon and determined that the Exhibit Ks which Horizon sought to enter into evidence differed in material aspects from Horizon's own Exhibit K because other carriers' Exhibit Ks did not include certifications similar to Horizon's that intentionally excluded certain net paid losses. Ibid.

Horizon also excepted to the ALJ's finding that the IHC Board's decision to allow Traveler's to amend its Exhibit K in 1999 was irrelevant. In the Initial Decision, ALJ Hurd made the following finding of fact:

I FIND the evidence regarding another carrier's amendment to an Exhibit K discussed and approved by the IHC Board in May 1999 also to not be relevant. This Exhibit K also was not filed with certifications intentionally excluding certain net paid losses, as was the case with Horizon. Furthermore, this evidence has no relevancy to the issue remanded by the Appellate Division regarding waiver. [Initial Decision at 3.]

ALJ Hurd clearly considered the evidence in question and noted that it differed in material respects from the evidence pertaining to Horizon's 1993 and 1994 Exhibit Ks. In particular, ALJ Hurd noted that the Traveler's Exhibit K was not accompanied by certifications intentionally excluding certain net paid losses, as was Horizon's. Moreover, whether or not Traveler's was permitted to amend its Exhibit K in 1999 has no bearing on the question of whether Horizon intended to exclude its MICP expenses and CARS costs from its net paid losses in its 1993 and 1994 Exhibit Ks. The transmittal of this matter to the OAL resulted from the Appellate Division's remand, which was specific:

We conclude that Horizon is entitled to a hearing on the issue of whether the 1993 and 1994 certification constituted waivers of Horizon's right to reimbursement of the employee incentive expenses and amortization of deferred system development costs. We therefore, remand the matter for a hearing solely on the waiver issue. [In re Horizon Loss Reimbursement, supra, slip op. at 15).

The evidence regarding Traveler's 1999 amendment to its Exhibit K had no "tendency in reason to prove or disprove any fact of consequence to the determination of the action[,] " to wit, the intent of Horizon to waive its right to reimbursement for certain costs. N.J.R.E. 401. There is, therefore, no "logical connection between the proffered evidence and a fact in issue." State v. Hutchins, 241 N.J. Super. 353, 358(App. Div. 1990). ALJ Hurd correctly found that evidence pertaining to other carriers' ability to amend their Exhibit Ks, as well as Traveler's 1999 amendment to its Exhibit K, was irrelevant to the issue of whether Horizon waived its right to reimbursement for MICP expenses and CARS costs in its 1993 and 1994 Exhibit Ks. We therefore uphold ALJ Hurd's exclusion of Exhibits P-16 and P-17 (discussing the 1999 amendment of Traveler's Exhibit K) and, furthermore, continue the seal placed by ALJ Hurd on testimony regarding those documents as well as excerpts of those Exhibits which appear in Horizon's

post-hearing briefs, because these Exhibits contain materials subject to deliberative process and attorney-client privileges.

ALJ Hurd correctly rejected Horizon's contention that the IHC Board violated its enabling statute by disallowing expense items which were expressly found statutorily reimbursable by the independent auditors, and correctly found that the effect of the independent audit on Horizon's waiver of reimbursement of the MICP expenses and CARS costs is beyond the scope of the issue remanded by the Appellate Division. Initial Decision at 6. As noted supra, the Appellate Division's remand addressed solely the issue of Horizon's intentional waiver of its right to reimbursement of the employee incentive expenses and amortization of deferred system development costs. Because the issue of whether the IHC Board violated its enabling statute is beyond the scope of the remand order, the ALJ properly refused to consider Horizon's argument.

Moreover, even if this issue were not beyond the scope of the remand order, the IHC Board did not violate its enabling statute. As found above, Horizon knowingly relinquished its right to certain reimbursable expenses, so

the IHC Board had no obligation to disallow Horizon's voluntary and knowing exclusion.

Finally, in Exceptions, Horizon requested that we adopt their additional proposed findings of fact, including that the amount in controversy is being held in escrow and that if the IHC Board prevails in this litigation, the monies will be refunded to the carriers that paid the loss assessments. We decline to adopt these additional findings of fact on the grounds that they are irrelevant, inasmuch as they are not necessary to this final determination.

For all of the reasons set forth above, and because the ALJ's holding in the Initial Decision reflected an application of the appropriate regulatory standard provided in N.J.A.C. 11:20-9.6, as well as a thorough review of the extensive record, the Initial Decision is adopted as the Individual Health Coverage Program Board's Final Decision, as supplemented herein.

Mary McClure, Chairwoman
Individual Health Coverage Program